

April 12, 2004

Commission's Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Comments on RM-10865, Petition for Rulemaking

Attention:

The American Civil Liberties Union (ACLU) urges the Commission to reject the petition of the Federal Bureau of Investigation, U.S. Department of Justice and the U.S. Drug Enforcement Administration (RM-10865) to initiate a new rulemaking procedure to resolve outstanding issues associated with the implementation of the Communications Assistance for Law Enforcement Act (CALEA). We believe a rulemaking of this type would exceed the authority granted the Commission under CALEA.

In 1994 when Congress enacted CALEA it demonstrated foresight by recognizing the fundamental difference between traditional telephone service and the Internet. Not only does CALEA apply only to telecommunications carriers it also contains a complete exemption for all "information services". Even in its infancy, it was clear that the Internet represented a completely new form of communication with enormous potential to change the lives of every American. The medium has matured over the last decade and fulfilled much of that promise. It has created the ability to share information and connect individuals on a scale unimaginable at any other time in human history. It has enriched our civic institutions and nurtured the information flow and debate that is the lifeblood of our democratic society.

Amazingly, as much impact as the Internet has had on world communications, it is still not a mature technology. Individuals and corporations discover new applications and breakthrough technologies every day. Not only does this constant innovation benefit society, it also helps drive the United States economy. It creates new markets for goods and services and maintains America's advantage in one of the crucial new technologies of the 21st century. One of the most important of these new innovations is the use of the Internet for voice communications. Called variously, Voice over Internet Protocol, IP telephony or Internet, VoIP has

been characterized by Chairman Michael Powell as, “probably the most significant paradigm shift in the entire history of modern communications, since the invention of the telephone.” *FCC chief plans no Internet telephony regulation*, REUTERS, Jan. 22, 2004. VoIP may represent the first step in a merger of the benefits of voice and electronic communication.

It is this groundbreaking technology, and the enormous potential that it represents, that the FBI seeks to regulate in this request for rulemaking. In essence the FBI petition would require that any new technology be compatible with the requirements of CALEA before it is ever released. This request is fundamentally misguided for four reasons.

It incorrectly applies the statutory language of CALEA. An entity covered by CALEA must be a telecommunications carrier that does not engage in providing information services. VoIP is the exact opposite. It is an information service that does not act as a telecommunications carrier.

It stifles innovation. CALEA was created to apply to the traditional telephone network and its standards and requirements. Those standards are neither appropriate nor beneficial to VoIP. Replicating the same features and structure in VoIP as exists for current phone service will be costly and unnecessary. Worse, waiting for law enforcement approval of these features will mean extensive delays in bringing new products to market. These unnecessary regulations and market delays will hobble American communication companies in their competition with international rivals and drive a new industry with enormous potential overseas.

It misreads the intent of CALEA. When CALEA was passed both Congress and the FBI agreed that its purpose was not to expand law enforcement wiretap authority but instead to maintain the status quo. CALEA authorized the FCC to help law enforcement standardize surveillance for a mature industry. Instead the FBI has consistently relied upon the statute to seek a broad expansion of its authority. CALEA has already been used in packet mode communications to justify the FBI’s efforts to secure the entire packet stream under a simple trap and trace order. This dangerous and unauthorized expansion of law enforcement wiretapping authority is just one example of law enforcement overreaching through CALEA. The petition would be equally dangerous, allowing the FBI to dictate new standards to a new industry – one that Congress has explicitly stated should be exempt from the reach of CALEA.

It is unnecessary. The dictates of Title III remain unchanged. Every communications provider is required to assist law enforcement in its efforts to execute a lawfully secured wiretap order. This requirement remains the same whether the communication takes place over the traditional telephone network or a VoIP application. Over the last several years as other types of

packet mode communications, such as cellular technology, have expanded the FBI has proved very adept at crafting standards which allow it to secure necessary access to these communications. The FBI's desire to have all these communications available in a standardized manner certainly does not justify the stifling of an entire industry.

Title III grants law enforcement the right to gain timely access to authorized communications in order to combat crime and terrorism. However, the manner in which the FBI and other law enforcement are pursuing this objective is both wrongheaded and dangerous. It threatens to render stillborn a brand new communications industry and poses a significant risk to the entire Internet. Congress recognized the delicate balance between the desires of law enforcement and the need to protect new information services. The FCC must respect that decision. It does not have the authority to promulgate a rulemaking of the type and scope requested by the FBI. If the FCC perceives that any portion of law enforcement's request has merit it must seek authority for any expansion of CALEA from Congress.

We urge the Commission to reject the proposed rulemaking as beyond the scope of the Federal Communications Commission's authority under CALEA and safeguard the Internet from unnecessary and harmful intrusion.

Respectfully submitted,

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